

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Southwestern Bell Telephone Company
Tariff F.C. C. No. 73

)
) Transmittal Nos. 2433
) and 2449
) CC Docket No. 95-140

OPPOSITION TO DIRECT CASE

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OPPOSITION TO DIRECT CASE

Time Warner Communications Holdings, Inc. ("TW Comm"), a wholly-owned subsidiary of Time Warner Entertainment, L.P., pursuant to the Order Designating Issues for Investigation¹ hereby files its Opposition to Direct Case. As shown herein, Southwestern Bell Telephone Company's ("SWBT") Direct Case,² filed with the Commission on September 11, 1995, is patently deficient and fails to demonstrate the need for the proposed tariff revisions. The Commission should reject SWBT's transmittals outright.

I. SWBT's Case Is Procedurally Inadequate and Thus Fails to Comply with the Commission's Order

The purpose of ordering a carrier to file a Direct Case is to give the carrier an opportunity to present arguments and evidence supporting its position. SWBT has been given such an opportunity but has failed to provide enough evidence to support the lawfulness of its Request for Proposal ("RFP") tariff filing.

¹ In re Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2433 and 2449, CC Docket No. 95-140, Order Designating Issues for Investigation (released August 25, 1995) ("SWBT Order").

² Direct Case of Southwestern Bell Telephone Company, filed September 11, 1995 ("Direct Case").

the lawfulness of its Request for Proposal ("RFP") tariff filing. The evidence presented by SWBT's in its Direct Case is deficient in all aspects, thus warranting a rejection.

A. SWBT Fails to Substantiate The Facts it Presents

Throughout its Direct Case, SWBT offers conclusory allegations without substantiation, uses terms without clearly defining their meaning and suggests the application of legal principles without reference to their source. SWBT also fails to specifically address many of the issues presented by the Commission in its Order.³

For instance, when commenting on whether it should have to determine the number of bidders responding to a RFP, SWBT asserts, "[a]ny policy that sets a 'quota' on market share loss or on the number of bidders required before the LECs are allowed to respond to competitive bids is contrary to the public interest, and offends SWBT's rights under applicable law."⁴ SWBT obscures its argument by failing to provide a cite to, or an explanation of the "applicable law" to which it refers. The obscurity is in no way relieved by a vague threat that the Commission would be accountable for failing to grant the relief SWBT is seeking. Instead, it is the threat itself that offends.

Throughout its Direct Case, many of the questions answered by SWBT are based on the assumption that it is facing full competition in the local exchange market but it provides no evidence to demonstrate that competition is indeed a reality in

³ See SWBT Order.

⁴ Direct Case at 8.

any of the markets in which it serves. Thus, until it can demonstrate that competition is flourishing in the local exchange market, little credence can be given to most of its arguments.

SWBT does refer to particular percentages as evidence substantiating the existence of competition in the high capacity market.⁵ However, not only does SWBT fail to provide the origin of its data supporting this claim, as well as an explanation justifying its findings, but it also fails to provide the necessary definition of what constitutes the "high capacity market" for purposes of its percentage calculations.⁶ Further, even if SWBT had supported its claim with verifiable data, the data presented is limited to two market areas and it is impossible to reach conclusions about whether competition exists in SWBT's other market areas based on this unrelated - and unsubstantiated - data.

SWBT also fails to answer the majority of the questions the Commission developed in its Order and sidesteps many the issues on which the Commission seeks comment by relying on the existence of competition. For example, the Commission specifically requested comment on how SWBT would verify whether other bidders were participating in the RFP, and whether a competitive situation would exist if no other party responded to an RFP. SWBT simply comments that this issue is not relevant due

⁵ Id. at 14-15.

⁶ For example, there is no indication whether the percentages relate to switched circuits as well as dedicated circuits.

to the competitive facts facing SWBT, yet it fails to elaborate on the specific "competitive facts" to which it is referring.⁷

Furthermore, in attempting to justify broader pricing flexibility, SWBT concludes, without explanation, that its approach is "totally consistent" with Commission policy. It supports this argument by quoting a Commission Order which states, "additional pricing flexibility may well be justified as competition develops."⁸ Again, this argument presupposes the existence of competition that has not been demonstrated. More suspect, however, is the underlying rationale of this argument. SWBT's argument for allowing it greater pricing flexibility is based on a 1992 quote issued by the Commission which merely states that the development of competition may justify additional pricing flexibility. Not only has the Commission not yet deemed the local exchange market to be fully competitive, but the quote simply states that pricing flexibility *may* be considered. The entire argument lacks merit and substance.

B. SWBT Provides No Evidence Upon Which the Commission Can Evaluate the Consistency of its Tariff with the Requirements of the Communications Act

Based on the complete lack of substance supporting the Direct Case, the Commission has no means by which to evaluate whether SWBT's proposal is consistent with the Communications Act. A proposed tariff or proposed change to an existing tariff must be rejected until it is demonstrated that the proposal is

⁷ Direct Case at 7.

⁸ Id. at 11 (quoting In re Expanded Interconnection with Local Telephone Company Facilities, First Report and Order, 7 FCC Rcd 7369, para. 186 (1992)).

consistent with the Communications Act of 1934 and with Commission rules and regulations.⁹ However, SWBT has provided so little substantiated evidence in its Direct Case that the Commission can not conclude that the proposal is lawful. The lack of substantiated support in SWBT's Direct Case is failure of proof and requires rejection.

II. The Assumptions Underlying the Proposed RFP Process are Unrealistic

The rate regulations portion of the RFP proposal is not detailed. It provides that a customer will have 180 days after receiving a RFP rate to order the requested service and that a RFP must reflect that the request involves a competitive situation to avail themselves of "application-specific rates."¹⁰ SWBT plans to use the same facilities that it uses to provide its other tariffed services.¹¹ SWBT alleges that the proposed RFP process is SWBT's response to "customer requests for proposal submitted to SWBT in competitive bid situations."¹² However, the proposed RFP process does not represent competition in any form, will place the incumbent provider at a significant advantage, and fails to ensure that the most efficient provider will "win" the bid to provide the requisite service.

⁹ See, e.g. American Broadcasting Companies, Inc. v. FCC, 633 F.2d 133, 138 (D.C. Cir. 1980); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

¹⁰ Proposed Section 29.2.

¹¹ Id.

¹² Proposed Section 29.1.

**A. In Practice, the Proposed RFP Process Will
Not be Competition in its Purest Form**

SWBT's Direct Case mischaracterizes the RFP process as "competition in its purest form".¹³ The assertions SWBT makes in support of its proposed RFP process are unrealistic and impractical. Particularly because workable competition does not yet exist, SWBT's assumption that those participating in the RFP process, including the incumbent provider, will act in a non-discriminatory fashion is naive and inaccurate. Remarkably, SWBT argues that its conclusion that those participating in the RFP process will act in a non-discriminatory fashion is the only logical conclusion and "to determine otherwise would be to presume that SWBT's customers would make a charade of an RFP in order to obtain favorable pricing from SWBT."¹⁴ To reach this position, SWBT makes the implausible assumption that market entrants will take those steps necessary to ensure that the process will remain impartial despite an obvious incentive to favor their own interests.

SWBT explains the RFP process in simple terms but even its simplicity belies the fact that even if the process works as SWBT claims that it will - and it will not - there are no guarantees that participants will treat proposals confidentially or that selection will be made in a consistent manner. SWBT does

¹³ Direct Case at 3. "The RFP process is competition in the purest form, one that produces a market-based outcome that incentivizes vendors to be efficient and that maximizes consumer benefit." Id.

¹⁴ Id. at 7.

not even attempt to argue that this will be true in every instance. Instead, it says it will "usually" be true.

All proposals received are usually treated as confidential. The selection is usually based on a combination of pricing, timing, strategic and operational factors.¹⁵

It is unreasonable to assume that bids in an RFP process will be treated confidentially with any consistency. Even if participants in the RFP process do not intentionally attempt to gain a competitive advantage by actively seeking to determine the contents of confidential bids and negotiations, this information may be disclosed through inadvertence. Individual bidders will simply not be in isolation and cannot be relied upon to act in order to shield themselves from finding out information about others' bids or from leaking information about their own bids.

In addition, the vague selection process will provide SWBT with additional opportunities to thwart competition. In fact, the Commission rejected a similar tariff proposal made by SWBT, after concluding that SWBT's proposed tariff language violated the Commission's requirement¹⁶ that tariffs be specific. The Commission determined that it could not "discern from the language how [SWBT] would exercise its discretion in selecting the services to be provided" in response to such requests, and that "it is unclear from the face of the tariff what would constitute a bona fide request."¹⁷ Thus, without providing any

¹⁵ Id. at 5 (emphasis supplied).

¹⁶ 47 C.F.R. §§ 61.2 and 61.54(j) (1995).

¹⁷ Southwestern Bell Telephone Co., 9 FCC Rcd 2683, 2686 (1994).

compelling arguments why it is true, SWBT's Direct Case inaccurately assumes both that proposals will be treated confidentially and that selection will be made consistently in an equitable fashion.

B. The Lack of Definition of SWBT's Amorphous "RFP Process" Will Wreak Competitive Harm

Even if workable competition already existed - and it does not - the implementation of the RFP process would result in irregularities and inequities in the market for local service. An RFP process will provide an opportunity for fair competition only if implemented in a stable and predictable manner. For an RFP process to operate stably, predictably, and equitably, standards cannot be pushed to the side as SWBT suggests.¹⁸

Ideally, competitive bidding will assist with an orderly transition to a competitive telecommunication environment. If the SWBT's standardless RFP proposal is implemented, however, the unstable and unpredictable nature of its implementation will actually serve as a disincentive for market entrants and will slow - or perhaps stop - the transition to a competitive telecommunications environment. At a minimum, if implemented, SWBT's RFP proposal will skew interexchange competition by authorizing SWBT to offer non-cost-based volume discounts to certain customers.

C. SWBT's RFP Process Will Place Certain Entities at a Significant Advantage

¹⁸ "There is no need to create standards for a competitive bid situation." Direct Case at 5.

SWBT erroneously concludes that the mere existence of the RFP process itself, "whether or not other vendors choose to participate, constitutes a competitive bid situation."¹⁹ Rather than providing new entrants with the opportunity to compete with incumbent providers, however, SWBT's RFP process will deprive some potential market entrants of any opportunity to enter the market. The assumptions underlying SWBT's definition of a competitive situation will allow SWBT to abuse market power in situations that are not truly competitive but that fit within SWBT's overly broad definition of a competitive situation: a situation where "invitations to bid are given by more than one supplier."²⁰ SWBT's proposal erroneously assumes that the mere "existence of an RFTP under the terms established in SWBT's tariff . . . is sufficient to justify that SWBT be given the ability to make a competitive response."²¹

The proposed tariff revisions would permit SWBT to offer identical services at significantly lower rates to those access customers that submitted an RFP to SWBT.²² However, even if more than one provider participates in the RFP process described in SWBT's filing, the process does not ensure that viable alternatives comparable to the service and price of the incumbent provider actually exist before SWBT offers identical services at lower rates. In addition, under the Communications

¹⁹ Id. at 7.

²⁰ Id. at 6 n.4.

²¹ Id. at 14.

²² Proposed Section 29.1.

Act, tariffed services of general applicability must be made available on a non-discriminatory basis. The only distinguishing factor between access customers receiving the existing tariffed services and those receiving service under the RFP proposal is the RFP process.

III. RFP Process will Prematurely Deregulate Southwestern Bell Before a Competitive Market Exists

A. SWBT's Direct Case Reflects SWBT's Lack of Understanding or Disregard of Market Power

Both the RFP proposal itself and numerous statements in SWBT's Direct Case reflect a complete lack of understanding or total disregard of the market power issues that the Commission must consider before authorizing completely flexible pricing.

For example, SWBT's Direct Case states:

Effective competition does not hinge on having many suppliers in a particular market. Nor is the size of each participant's market share relevant to a specific purchasing decision.²³

SWBT's interpretation of what constitutes effective competition, however, flies in the face of microeconomic theory and established Commission precedent. One of the factors necessary for a truly competitive market is the presence of numerous providers and the complete freedom of entry into the marketplace. The market that SWBT is part of possesses neither of these qualities. If the Commission allows the transmittals to go into effect, SWBT could discourage competitors and, ultimately, eliminate the threat of competition.

²³ Direct Case at 8.

There is little competitive necessity for SWBT's tariff. SWBT continues to possess substantial market power in the market at issue and there is no indication that it will not exercise that power to its full extent when a competitor appears. Simply put, no non-dominant carrier possesses the power that SWBT has to prevent its competitors from fairly and efficiently interconnecting with it.²⁴ Further, SWBT continues to maintain large economies of scale and its Direct Case fails to address the high entry costs of competitors. As a result of its large economies of scale, SWBT need not set prices according to the laws of supply and demand, or according to its costs. Thus, SWBT's claim that it lacks market power cannot be given serious consideration by this Commission.

B. SWBT's RFP Proposal will Deregulate SWBT

According to SWBT, the RFP proposal is SWBT's "response to customer requests for proposal submitted to [SWBT] in competitive bid situations."²⁵ SWBT's "response" is - at best - premature. Competition does not yet exist in SWBT's market. As described in Section I above, SWBT's direct case made no attempt to support its assumptions that a competitive market currently

²⁴ In fact, the Commission recently found SWBT's virtual collocation rates to be unjust and unreasonable and these rates are currently under investigation. See In re Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Phase I, Order Designating Issues for Investigation, 10 FCC Rcd 3927 (1995); In re Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Phase I, Report and Order, 10 FCC Rcd 6375 (1995).

²⁵ See Proposed section 29.1.

exists. If SWBT implemented its RFP proposal, potential customers would issue RFPs simply to benefit from SWBT's discriminatory offering, whether competition actually exists or not. It is simply too soon for the Commission to stop regulating access services. Presently, the Commission must continue its role in the transition to competition to achieve two goals: (1) to ensure that the transition actually occurs; and (2) to prevent the abuse of any remaining market power that the incumbent provider possesses.

SWBT's proposed tariff would allow it to provide discounted access service with flexibility that the Commission has not even extended to switched entrance and interoffice access facilities. After much consideration, the Commission established conditions, which, when met and when combined with the pricing flexibility already provided in price caps, currently provide SWBT with significant pricing flexibility. SWBT's Direct Case does not explain why the flexibility the FCC has already provided, such as zone and volume discounts, fails to provide the means necessary to respond to competitors.

To provide LECs with pricing flexibility, the Commission authorized LECs to offer reasonable volume and term discounts on switched entrance and interoffice facilities under certain conditions. In the Commission's Virtual Collocation Order, the Commission authorized LECs to introduce density zone pricing of interstate high-capacity special access in a study area after their expanded interconnection offerings are operating

in that study area - that is, once at least one interconnector has taken a special access cross-connect element.²⁶

Competition may, indeed exist without expanded interconnection.²⁷ However, the Commission currently relies on expanded interconnection as a benchmark to test whether competition exists. On September 20, 1995, the Commission issued a Further Notice of Proposed Rulemaking ("FNPRM") in its performance review of the LEC price cap.²⁸ The stated purpose of the FNPRM is further indication that SWBT's RFP proposal is premature. Specifically, the Commission noted that purpose of the rulemaking is,

to consider and propose specific changes to interstate access price regulation to respond to changes in the market for these services and to rely more heavily on market forces to achieve our public policy goals.²⁹

²⁶ In re Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5174 (1994). In addition, the Commission permitted the LECs to offer switched transport with volume and term discounts in an particular study area after meeting, one of the following conditions: (1) 100 DS-1 equivalent switched cross-connects are operational in Zone 1 offices in the study area; (2) an average of 25 DS-1 equivalent switched cross-connects per zone 1 office are operational; and (3) in study areas with no Zone 1 offices, once five DS-1 equivalent switched cross connects have been taken in the study area. Id. at 5194-97.

²⁷ If competition in fact does exist in SWBT's markets. However, SWBT's Direct Case did not demonstrate that competition exists without expanded interconnection but instead assumed it to be so.

²⁸ In re Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking (released September 20, 1995).

²⁹ Id. at para. 1.

Until the Commission establishes another test to determine if competition exists - other than a process as arbitrary as the RFP process that SWBT suggests - it must continue to rely on expanded interconnection as a benchmark.

SWBT erroneously asserts that as competition "has developed", more flexibility, beyond zone density pricing, is now required.³⁰ However, even if zone density pricing is "premised on a high degree of rate averaging" and it was not "intended to be full pricing flexibility"³¹ as SWBT asserts, zone density pricing is current Commission policy and SWBT cannot circumvent it through its RFP proposal. In the FNPRM, the Commission will determine the process that best "matches the customer's desire for greater competition and . . . better serves the public interest than zone density pricing alone."³²

³⁰ Direct Case at 11.

³¹ Id. at 12-13.

³² Id. at 13.

IV. Conclusion

For the foregoing reasons, TW Comm respectfully requests that the Commission reject SWBT's Transmittal Nos. 2433 and 2499.

Respectfully submitted,

**TIME WARNER COMMUNICATIONS
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September 25, 1995

CERTIFICATE OF SERVICE

I, David R. Poe, hereby certify that on this 25th day of September, a true copy of the foregoing Opposition to Direct Case filed by Time Warner Communications Holdings, Inc., was sent via First Class Mail, Postage Prepaid, or Hand Delivered, upon each of the parties listed.


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